SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 240

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO, and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, GREAT LAKES DISTRICT, AFL-CIO,

Petitioners,

against

W. WILLARD WIRTZ, Secretary of Labor United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

HOWARD SCHULMAN,
50 Broadway,
New York, New York, 10004.

STEPHEN KURZMAN,
1616 H Street, N.W.,
Washington, D. C. 20006.

Attorneys for Petitioners

BERTRAM PERKEL,
ANDREW T. MCEVOY, JR.,
of Counsel.

INDEX

	PAGE
Opinions and Orders of the Courts Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	3
A. The Proceedings in the District Court	3
B. Newly Discovered Evidence	5
Reasons for Grating the Writ	7
The orders of the Courts below which permit respondent Secretary of Labor, in compliance with a request of the Department of Justice, to conduct an investigation and audit the books and records of petitioners under the powers granted him by Sections 601 and 607 of the LMRDA for the purpose of gathering evidence for use by the Department of Justice in a pending federal grand jury investigation and subsequent federal prosecution for a crime wholly unrelated to the purposes and scope of the LMRDA, are in direct conflict with this Court's holding in *Abel* v. *United States*, 362 U.S. 217 (1960)	7
Conclusion	13
APPENDIX A—Constitutional and Statutory Provisions and Rule Involved	14
APPENDIX B—Order of the United States District Court for the District of Columbia	18
APPENDIX C—Judgment of the United States Court of Appeals for the District of Columbia Circuit	21
APPENDIX D—Order and Opinion of the United States Court of Appeals for the District of Columbia on Motion for Reconsideration	22

Table of Cases

PAGE

Abel v. United States, 363 U.S. 217 226 (1960) 7, 11, 12

Application of Myers, 202 F. Supp. 212, 213 (E.D. Pa. 1962) 9

Boren v. Tucker, 239 F. 2d 767, 772-73 (9th Cir. 1965) 9

Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967) 11

Chapman v. Maren Elwood College, 225 F. 2d 230 (9th Cir. 1955) 9

Durbin v. United States, 221 F. 2d 520 522 (D.C. Cir 1954) 9

F.T.C. v. American Tobacco Co., 264 U.S. 293, 307 (1923) 10

Mancusi v. DeForte, —U.S. —, Case No. 844, decided June 17, 1968 9

National Window Glass Workers, In re, 287 Fed. 219, 223 (N.D. Ohio 1922) 9

Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946) 12

Reisman v. Caplin, 375 U.S. 440, 449 (1964) 9

See v. Seattle, 387 U.S. 541 (1967) 11

PAGE

United States v. Kulukundis, 329 F. 2d 197, 199, (2d Cir. 1964) 9

United States v. Lipshitz, 148 F. Supp. 774, 775, 776 (E.D. N.Y. 1957) 9

United States v. O'Connor, 118 F. Supp. 248, 250-51 D. Mass. 1953) 9, 11

United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958) 9

United States v. Proctor & Gamble Co., 187 F. Supp. 55, 63 (D.N.J. 1960) 9

United States v. Proctor & Gamble Co., 25 F.R.D. 485 (D.N.J. 1960) 9

Constitution and Statutes

UNITED STATES CONSTITUTION:
Fourteenth Amendment 10, 11, 12

LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, 29 U.S.C. 401, *et seq.*:

Section 601, 29 U.S.C. 521 ..... 4, 6

Section 607, 29 U.S.C. 527 ..... 6, 8, 12

IN THE

Supreme Court of the United States

October Term, 1967

No.

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO, and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, GREAT LAKES DISTRICT, AFL-CIO,

Petitioners,

against

W. WILLARD WIRTZ, Secretary of Labor United States Department of Labor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on March 29, 1968.

Opinions and Orders of the Courts Below

The District Court for the District of Columbia issued no opinion; the Order of said Court, unreported, is printed as Appendix B hereto (18-19).* The Court of Appeals for the District of Columbia issued no opinion; the Judgment

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* Numerical references are to pages of this petition and the appendices annexed.

of said Court, unreported, is printed as Appendix C hereto (21). The Order and Opinion of the Court of Appeals for the district of columbia on petitioners' motion for leave to file petition for reconsideration and petition for reconsideration, unreported, is printed as Appendix D hereto (22-23).

Jurisdiction

The order of the Court of Appeals on petitioners' motion for reconsideration was entered on March 29, 1968 (App. D, 22-23). The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 2101(c).

Question Presented

Section 607 of the Labor-Management Reporting and Disclosure Act of 1959, as amended (73 Stat. 541, 29 U.S.C. 527) provides that:

> "The Attorney General or his representative shall receive from the Secretary [of Labor] for appropriate action such evidence developed in the performance of his functions under this chapter as may be found to warrant consideration for criminal prosecution under the provisions of this chapter or other Federal law,"

Does Section 607 authorize the Secretary of Labor, at the request of the Department of Justice, to subpoena the records of petitioner labor organizations for the purpose of gathering evidence for use by the Department of Justice in a federal grand jury investigation and subsequent federal prosecution of a crime or crimes wholly unrelated to scope and purposes of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*?

Constitutional and Statutory Provisions Involved

The pertinent Constitutional provision involved is the Fourth Amendment to the Constitution. The pertinent statutory provisions involved are Sections 601 and 607, Labor-Management Reporting and Disclosure Act of 1959, as amended (73 Stat. 519-546, 79 Stat. 888, 29 U.S.C. Section 401 *et seq.*). The relevant provisions thereof are set forth in Appendix A, *infra* (14-17).

Statement of the Case *

A. The Proceedings in the District Court

Petitioners brought on the action below to enjoin respondent Secretary of Labor ("Secretary") from enforcing certain administrative subpoenas which he issued in pursuit of an audit he was purportedly conducting in accord with the purposes and powers of the Labor-Management Reporting and Disclosure Act of 1959, as amended ("LMRDA").

Petitioners alleged that the Department of Justice, in connection with a pending investigation by a federal grand jury into the bombing of a ship in Chicago, asked the Secretary to help gather evidence to be used in that criminal

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* By permission of the court below the appeal was heard on the original papers and no record on appeal was printed. References herein to pleadings and papers will be made according to the following notations: Petitioners' Complaint—"C"; Petitioners' Motion for Preliminary Injunction—"Pet. Mt."; Respondent's Motion to Dismiss, or in the alternative for Summary Judgment and to compel Compliance with Administrative Subpoenas—"Resp. Mt."; Petitioners' Answer in Opposition to Resp. Mt.—"Pet Opp."; Respondent's Motions to Quash Subpoenas—"Res. Mt. Quash"; Transcript of Hearing on Resp. Mt.—"T."; Petitioners' Motion for Leave and Petition for Reconsideration—"Pet. Mt. Recon."; Respondent's Answer to Pet. Mt. Recon.—"Resp. Ans. Recon."

prosecution. Petitioners accused the Secretary of Labor of agreeing to help the Department of Justice. In pursuit of that agreement, the Secretary utilized the broad powers of investigation given him under the LMRDA to conduct a general search of petitioners' books and records to develop evidence for the Department of Justice which it, in turn, would use in connection with the grand jury investigation and subsequent prosecution for the crime or crimes related to the ship bombing—none of which are cognizable under the LMRDA (C., 1-7).

In the face of these serious allegations—that the Secretary of Labor was "fronting" for the Department of Justice in conducting this investigation—petitioners found the Secretary adopting a curious posture. He admitted contact with the Department of Justice and that he had commenced his investigation as a consequence of this contact and of the information obtained thereby (Res. Mt. Kleiler Aff., 2). Beyond this the Secretary would not go. He chose not to deny the allegations but rather to avoid the issue entirely by stating that his investigation was plainly within his statutory authority. Ignoring the crucial issue whether he had begun the investigation at the instigation and request of the Department of Justice and for its benefit, the Secretary was content to maintain that his investigation and the disclosure of any information developed thereby was expressly authorized and mandated by the LMRDA. Nowhere, however, did the Secretary disclaim or deny the allegation of improper purpose—that the Secretary was "fronting" for and acting as the cats'-paw of the Department of Justice.

It is in this curious context that the District Court found it appropriate to conclude:

> "... (a) there is no genuine issue of material fact in this action, (b) the investigation undertaken by [the Secretary] and referred to in the complaint is authorized by Section 601 of the Labor-Management

> Reporting and Disclosure Act, 29 U.S.C. 521, (c) the Secretary of Labor has not abused his power nor undertaken the investigation for an improper purpose, and (d) [the Secretary] is entitled to a judgment as a matter of law; . . . (App. B, 18-19)

The Court of Appeals for the District of Columbia Circuit affirmed the District Court's order without opinion (App. C, 21).

B. Newly Discovered Evidence

While petitioners were preparing their application for certiorari they came upon evidence showing that the Secretary had already turned over some of their records to the Assistant United States Attorney in charge of the Chicago prosecution. This new evidence supported petitioners' complaint. It also contradicted representations made by attorneys for the Secretary to the Court of Appeals that the Secretary had not turned over any of the files and records obtained during the audit of petitioners to the Department of Justice. Petitioners asked this Court for additional time to file their petition for certiorari so that they might first bring this new information before the Court of Appeals for the District of Columbia. An extension of time was granted and on March 14, 1968 petitioners moved for reconsideration before the District of Columbia Circuit.

In their papers to the Court of Appeals petitioners stated that they had just come into possession of evidence, not previously discoverable, that the Secretary—contrary to the representations of his attorneys before the Court of Appeals—had turned over to the Department of Justice certain specific documents obtained from petitioners' files during the course of his audit. Petitioners submitted that this evidence showed that the Secretary was, in fact, using his administrative subpoena power for an improper purpose.

Petitioners argued that it was and had always been the Secretary's intent to use his investigative powers to gather evidence for the Department of Justice in connection with the prosecution of a criminal case wholly unrelated to the Secretary's jurisdiction under LMRDA (Pet. Mt. Recon.).

Again the Secretary did not deny that he was acting for the Department of Justice. Rather he asserted that he had the power to investigate under Section 601 of the Act even "if the Department of Labor pre-arranged with the Department of Justice for the passing on information relating to other crimes . . ." for Section 607 of the LMRDA gave him the authority so to do (Resp. Ans. Rec. 1-2).

The Court of Appeals denied petitioners' motion for reconsideration upon the grounds urged by the Secretary. They held that petitioners ". . . allegations, even if true, [did] not undermine the basis of [their] affirmance of the judgment of the District Court." (App. D, 23.) It was the opinion of the Court that the Secretary, by conducting the audit for the Department of Justice was exercising ". . . the authority given him by Congress to supply to the attorney general such information developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of the Act or other Federal Law. 29 U.S.C. 527." *Ibid.*

Reasons for Granting the Writ

The orders of the Courts below which permit respondent Secretary of Labor, in compliance with a request of the Department of Justice, to conduct an investigation and audit the books and records of petitioners under the powers granted him by Sections 601 and 607 of the LMRDA for the purpose of gathering evidence for use by the Department of Justice in a pending federal grand jury investigation and subsequent federal prosecution for a crime wholly unrelated to the purposes and scope of the LMRDA, are in direct conflict with this Court's holding in *Abel* v. *United States*, 362 U.S. 217 (1960).

This Court has condemned ". . . the deliberate use by the Government of an administrative [subpoena] for the purpose of gathering evidence for use in a criminal case . . ." and has directed that this conduct ". . . must meet stern resistance by the courts." *Abel* v. *United States*, 362 U.S. 217, 226 (1960). Yet the orders of the courts below give express judicial sanction to precisely this condemned conduct.

Stripped to essentials petitioners had charged the Secretary of Labor with perverting the investigative powers conferred upon him by LMRDA at the behest and instigation of the Department of Justice. In their verified complaint, the petitioners had accused the Secretary of using the broad powers of investigation given him under the LMRDA to conduct a general search of petitioners' books and records at the request of the Department of Justice to develop evidence for it which it, in turn, would use in connection with a federal grand jury investigation and subsequent prosecution in Chicago of a crime or crimes not cognizable under LMRDA.

In the face of these serious allegations—that the Secretary of Labor was "fronting" for the Department of Jus-

tice in conducting this investigation—the Secretary took a curious position. He admitted contact with the Department of Justice and that he had commenced his investigation as a consequence of this contact and of the information received thereby but beyond this he would not go (Res. Mt, Kleiler Aff., 2). He chose neither to affirm or to deny the allegations of "fronting" but merely to ignore them. Instead, he brought on motions to dismiss or for summary judgment and to enforce the administrative subpoenas contending that his investigation and the disclosure of any information developed thereby to the Department of Justice was expressly authorized and mandated by Sections 601 and 607 of the LMRDA.

The Court of Appeals agreed. They rejected as irrelevant petitioners' allegations and evidence in support of their complaint that the Secretary was turning over the fruits of his investigation to the Department of Justice for its use in a prosecution in Chicago. "These allegations, even if true, [did] not undermine the basis of [their] affirmance . . ." (App. D, 23). The basis being the fact that the Secretary, in conducting this investigation for the Department of Justice, was exercising authority conferred upon him by Congress under Section 607 of the LMRDA. *Ibid.*

Apparently, the Court of Appeals was of the opinion that this Court's decision in *Abel* merely condemned "the deliberate use by the Government of an administrative [subpoena] for the purpose of gathering evidence for use in a criminal case" where such use was not authorized by statute —and that in this case Section 607 of the LMRDA specifically allowed such conduct. Nor was the Court of Appeals concerned that "the inferences from the facts [in support cannot be used for the purpose of pre or post indictment discovery of evidence in a criminal case.

Under the present facts the use of an administrative subpoena in lieu of a search warrant must always run afoul of

the Fourth Amendment—since it omits "the indispensable condition that 'the inferences from thef acts [in support of the warrant] "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14.' *Giordenello* v. *United States,* 357 U.S. 480, 486." *Mancusi* v. *DeForte,* — U.S. —, Case No. 844, decided June 17, 1968.

With the exception of this case, each of the United States Courts facing this issue, whether directly or indirectly, has refused to find that Congress would or could authorize administrative agencies to be another arm of the Department of Justice and/or an extension of the grand jury without the additional safeguards surrounding compulsory disclosure of evidence in criminal cases. *Reisman* v. *Caplin,* 375 U.S. 440, 449 (1964); *United States* v. *O'Connor,* 118 F. Supp. 248, 250-51 (D. Mass. 1953). See also, *United States* v. *Proctor & Gamble Co.,* 356 U.S. 677, 683 (1958); *United States* v. *Kulukundis,* 329 F. 2d 197, 199 (2d Cir. 1964); *Boren* v. *Tucker,* 239 F. 2d 767, 772-73 (9th Cir. 1956); *Chapman* v. *Maren Elwood College,* 225 F. 2d 230 (9th Cir. 1955); *Durbin* v. *United States,* 221 F. 2d 520, 522 (D.C. Cir. 1954); *Application of Myers,* 202 F. Supp. 212, 213 (E.D. Pa. 1962); *United States* v. *Proctor & Gamble Co.,* 187 F. Supp. 55, 63 (D.N.J. 1960); *United States* v. *Lipshitz,* 148 F. Supp. 774, 775, 776 (E.D.N.Y. 1957); *In re National Window Glass Workers,* 287 Fed. 219, 223 (N.D. Ohio 1922); *United States* v. *Proctor & Gamble Co.,* 25 F.R.D. 485 (D.N.J. 1960).

Petitioners submit that "Congress has never in criminal matters vested the executive with an unrestricted subpoena power to uncover information which might aid in the enforcement of criminal statutes and the preparation of criminal cases . . ." *United States* v. *O'Connor, supra* at 250. Nor can any court "attribute to Congress any intent to defy the Fourth Amendment or even come so near to

doing so as to raise a serious question of constitutional law . . ." *F.T.C.* v. *American Tobacco Co.*, 264 U.S. 293, 307 (1923).

If, as respondents have successfully urged in the courts below, Congress can empower an administrative agency, having the broadest possible investigatory powers, to conduct searches and gather evidence upon request of the Department of Justice specifically for use in pending criminal investigation or prosecution, there has been a serious emasculation of the guarantees of the Fourth Amendment. The result would be that the scope and power of all governmental agencies, regulatory or law enforcement, would be virtually unlimited. Thus any agency, no matter how Congress may have limited its own power, could turn to another agency having broader powers and some nexus with the subject of the investigation and ask them to indirectly do what it has not the power to do directly.* Surely this erosion of the Fourth Amendment can not be allowed to stand.

The impact of such conduct and indirection can readily be appreciated in light of the tremendous increase in recent years in the variety, complexity and scope of governmental regulation. Today, it is difficult to conceive of a single area of enterprise which is not, in some fashion, subject to the visitorial and investigative scrutiny of at least one governmental agency. This Court has recently noted the problem created by the proscriptions of the Fourth Amendment and the investigative techniques employed by admin-

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* Under the decision of the Court of Appeals there would be no infirmity, constitutional or otherwise, should the F.T.C. or the Department of Justice ask the Department of Internal Revenue to audit a taxpayer's return under the guise of verifying its accuracy to search for evidence as to the source of the reported income for use in a pending prosecution under 15 U.S.C. 13(a)—making it unlawful to knowingly receive rebates etc. from a seller who does not offer these advantages to competitors.

istrative agencies in *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523 (1967) and *See* v. *Seattle*, 387 U.S. 541 (1967) and has indicated that it wished to review them on a case by case basis.

Although this Court has spoken on a part of the issue raised by this petition in *Abel*, by condemning the deliberate use of an administrative process to gather evidence for use in a criminal case, it has not yet had occasion to review whether Congress could vest in the Secretary of Labor, or any other administrative agency, such inquisitorial powers as would abrogate the traditional proscriptions and limitations imposed upon the Executive by the Fourth Amendment. Nor has this Court measured the impact that this use of an administrative subpoena will have upon the traditional limitations of pre and post indictment discovery imposed upon the government.

This petition presents a unique opportunity to review such a possible conflict between the Fourth Amendment and the power of an administrative agency to investigate. Respondent's position has been clear throughout. He asserts that Congress can and did give him the power to investigate the petitioners even though such investigation was started at the behest of the Department of Justice and was intended to gather evidence for use in pending unrelated criminal investigation and trial. Petitioners urge that Congress may not give such power to the respondent for:

> "The Constitution of the United States, the statutes, the traditions of our law, the deep rooted preferences of our people speak clearly. They recognize the primary and nearly exclusive role of the Grand Jury as the agency of compulsory disclosure. That is the inquisitorial body provided by our fundamental law to subpoena documents required in advance of a criminal trial, and in the preparation of an indictment or its particularization. See *Hale* v. *Henkel*, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652.

> To encourage the use of administrative subpoenas as a device for compulsory disclosure of testimony to be used in presentments of criminal cases would diminish one of the fundamental guarantees of liberty. Moreover, it would sanction perversion of a statutory power. The power under § 3614 was granted for one purpose, and is now sought to be used in a direction entirely uncontemplated by the lawgivers. The limitations implicit in every grant of power are that it will be used not colorably, but conscientiously for the realization of those specific ends contemplated by the donors of the power." *United States* v. *O'Connor, supra,* at 250-1.

To allow the orders of the lower courts to stand would attribute to Congress the intent and power to carve out a deep and serious inroad into the protections of the Fourth Amendment and would seriously undermine this Court's decision in the *Abel* case. By agreeing with respondent's contention that Section 607 of the LMRDA permits him to front and mask for the Department of Justice, the lower courts have made the proscriptions of the Fourth Amendment, as defined by this Court, subject to simple evasion and in many cases a meaningless formula.

The very nature of our complex society with its increasing regulation by government presents all persons and entities with a real and present threat of being subject to such an "administrative investigation" without being able to avail themselves of the traditional protections of our Constitution. *Cf Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186 (1946). The impact of this case upon the future conduct of administrative agencies and the Department of Justice will be significant. The limits of congressional power in this area and the validity of the construction placed upon Section 607 of the LMRDA by the respondent and the courts below should be determined by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD SHULMAN,
50 Broadway,
New York, N. Y. 10004.

STEPHEN KURZMAN,
1616 H Street, N.W.,
Washington, D. C. 20006.

Attorneys for Petitioners.

BERTRAM PERKEL,
ANDREW T. MCEVOY, JR.,
of Counsel.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

UNITED STATES CONSTITUTION:

AMENDMENT IV—SEARCHES AND SEIZURES

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The relevant provisions of the Labor-Management Reporting and Disclosure Act of 1959, as amended (73 Stat. 519-46, 79 Stat. 888, 29 U.S.C. § 401 *et seq.*), are as follows:

"DECLARATION OF FINDINGS, PURPOSES, AND POLICY

> SEC. 2. (a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

(c) The Congress, therefore, further finds and declares that the enactment of this Act is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce."

* * *

"TITLE VI—MISCELLANEOUS PROVISIONS

INVESTIGATIONS

Sec. 601. (a) The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation.

(b) For the purpose of any investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (15 U.S.C. 49, 50), are hereby made applicable to the jurisdiction, powers, and duties of the Secretary or any officers designated by him."

• • •

OTHER AGENCIES AND DEPARTMENTS

Sec. 607. In order to avoid unnecessary expense and duplication of functions among Government agencies, the Secretary may make such arrangements or agreements for cooperation or mutual assistance in the performance of his functions under this Act and the functions of any such agency as he may find to be practicable and consistent with law. The Secretary may utilize the facilities or services of any department, agency, or establishment of the United States or of any State or political subdivision of a State, including the services of any of its employees, with the lawful consent of such department, agency, or establishment; and each department, agency, or establishment of the United States is authorized and directed to cooperate with the Secretary and, to the extent permitted by law, to provide such information and facilities as he may request for his assistance in the performance of his functions under this Act. The Attorney General or his representative shall receive from the Secretary for appropriate action such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of this Act or other Federal law.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 377-67

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, *et al.*,

Plaintiffs,

v.

W. WILLARD WIRTZ, Secretary of Labor,

Defendant.

ORDER

This matter having come before the Court upon plaintiffs' motion for preliminary injunction, defendant's motion to dismiss or, in the alternative, for summary judgment, and to compel compliance with administrative subpoenas, and defendant's motions to quash subpoenas duces tecum, and the Court having considered the pleadings, affidavits and exhibits, and the parties having filed memoranda of law in support of and in opposition to the motions, and after hearing oral argument by counsel for the respective parties in open Court on defendant's motion to dismiss, or in the alternative, for summary judgment and to compel compliance with administrative subpoenas, and being fully advised in the premises, the Court concludes that (a) there is no genuine issue of material fact in this action, (b) the

investigation undertaken by defendant and referred to in the complaint is authorized by Section 601 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. 521, (c) the Secretary of Labor has not abused his power nor undertaken the investigation for an improper purpose, and (d) defendant is entitled to a judgment as a matter of law; it is, therefore, by the Court, this 6th day of April, 1967,

ORDERED that defendant's motion for summary judgment be and it hereby is granted, and the complaint is hereby dismissed; it is further

ORDERED (1) that plaintiffs be and they hereby are directed to produce all of the books, records, papers and documents specified and described in the subpoenas duces tecum issued on December 30, 1966 and served upon plaintiffs on January 3, 1967, copies of which are attached to the affidavit of Al Kerr, filed herein on February 16, 1967; (2) that such production be by delivery to Edwin L. Dooley, an officer of the Office of Labor-Management and Welfare-Pension Reports, United States Department of Labor, at 233 West 49th Street in New York City, New York, on or before 10 a.m. on the 14th day of April, 1967; (3) that defendant shall, further, have the right to retain said books, records, papers and documents so specified and described for a period of thirty (30) days from the date of production and delivery of the same, for the purpose of examination and inspection, and shall have the right to make reproductions thereof if desired and to conduct tests thereon; and (4) that plaintiffs may request the return of such books, records, papers and documents as may be necessary to the conduct of their business; that defendant, consistent with his need to conduct an investigation to determine whether any person has violated or is about to violate any provision of the Labor-Management Reporting and Disclosure Act

of 1959, except Title I or amendments made by the Act to other statutes, shall accommodate such request and return the requested books, records, papers and documents for a period not to exceed five (5) days, upon the execution by an officer of plaintiffs of a receipt satisfactory to defendant; and that the time during which plaintiffs retain such books, records, papers and documents in accordance with this provision of the Order shall be added to the thirty day period of time specified above; it is further

ORDERED that defendant's motions to quash subpoenas duces tecum be and they hereby are granted, and that the subpoenas served upon James J. Reynolds, Frank M. Kleiler, Hollis W. Bowers, John Fagan, John V. Moran, Edwin A. Brewer, George E. Long, Edwin L. Dooley and Lawrence G. Stewart, are quashed; and it is further

ORDERED that plaintiffs' motion for preliminary injunction be and it hereby is denied as moot.

/s/ BURNITA SHELTON MATTHEWS
United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing proposed Order has been made upon plaintiffs by personally serving a copy upon their attorney, Stephen Kurzman, Esquire, Kurzman & Goldfarb, 1616 H Street, N.W., Washington, D.C., on this 27th day of March, 1967.

/s/ Nathan Dodell
NATHAN DODELL
Assistant United States Attorney

APPENDIX C

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,906

September Term, 1967

Civil 377-67

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, et al.,

Appellants,

v.

W. WILLARD WIRTZ, Secretary of Labor, U. S. Department of Labor,

Appellee.

APPEAL FROM the United States District Court for the District of Columbia.

Before: Wilbur K. Miller, Senior Circuit Judge, and Burger and McGowan, Circuit Judges.

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed. See *International Bhd. of Teamsters* v. *Wirtz*, 120 U.S. App. D.C. 346, 346 F.2d 827 (1965).

Per Curiam

Dated: Dec. 12, 1967.

APPENDIX D

Order and Opinion of the United States Court of Appeals for the District of Columbia on Motion for Reconsideration

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,906, SEPTEMBER TERM, 1967

Civil 377-67

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, et al.,

Appellants,

v.

W. WILLARD WIRTZ, Secretary of Labor, U.S. Department of Labor,

Appellee.

Before:

WILBUR K. MILLER, Senior Circuit Judge,
BURGER and McGOWAN, Circuit Judges, in Chambers.

ORDER

The Clerk is directed to file appellants' lodged petition for reconsideration. The allegations in support of appellants' petition are that new evidence has come to light to the effect that the Secretary of Labor has in fact been furnishing information to the Department of Justice which is derived from the Secretary's inquiries under the Labor-

Management Reporting and Disclosure Act. But these allegations, even if true, do not undermine the basis of our affirmance of the judgment of the District Court. That basis was that there were no issues of fact requiring exploration, inasmuch as the Secretary expressly affirmed his purpose to exercise the authority given him by Congress to supply to the Attorney General "such evidence developed in the performance of his functions under this Act as may be found to warrant consideration for criminal prosecution under the provisions of the Act or other Federal law." 29 U.S.C. 527. Neither was there anything before the court to indicate that the Secretary, in auditing appellant Union's affairs because of the information which had come to his attention, was doing other than properly carrying out his investigatory functions under the Labor-Management Reporting and Disclosure Act. The purpose of that investigation could not be rendered illegal by the mere allegation that the Secretary would conform to the command of Congress that he disclose incriminating evidence to the nation's chief law officer.

Wherefore on consideration of the foregoing, it is

ORDERED by the court that appellants' petition for reconsideration is denied.

Per Curiam.

SUPREME COURT, U. S.

FILED

JUL 26 1968

JOHN F. DAVIS, CLERK

No. 240

In the Supreme Court of the United States

OCTOBER TERM, 1968

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 240

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL–CIO, ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. Prior to December 1966, the Department of Labor received information from the Department of Justice that the latter was preparing to prosecute certain individuals connected with the Seafarers International Union for conduct alleged to have occurred in Chicago in 1962–1964. The nature of this information "was such, together with other available information, as to indicate that an investigation of the financial records of the Seafarers International Union of North America and certain of its affiliates, was necessary to determine whether any provisions of the Labor-Management Reporting and Disclosure

314-697—68

Act of 1959 (29 U.S.C. 401 *et seq.*), had been violated"[1] (Kleiler Affidavit, p. 2). Petitioners ultimately refused to cooperate with this investigation, and the Secretary issued subpoenas *duces tecum* for production of union records.

Petitioners then brought an action to enjoin the investigation, alleging that the Secretary was acting pursuant to a secret agreement with the Department of Justice to gather evidence for the government's prosecution (see Pet. 3–4). The Secretary moved for summary judgment and for an order enforcing the subpoenas. The district court granted the motion and issued the order (Pet. App. 18–20).[2] The court of appeals affirmed (Pet. App. 21) and subsequently denied petitioners' motion for reconsideration (Pet. App. 22–23).

2. Section 601(a) of the Act, 29 U.S.C. 521(a), authorizes the Secretary to inspect the records of any person "when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this chapter * * *." (Pet. App. 16.) Section 607, 29 U.S.C. 527, requires the Secretary to turn over to the Attorney General any evidence "as may be found to warrant consideration for criminal prosecution under the provisions of

[1] Possible violations of the Act might include failure to report or false reporting (29 U.S.C. 439) or mishandling (29 U.S.C. 501) of union funds. Cf. *International Brotherhood of Teamsters* v. *Wirtz*, 346 F. 2d 827, 831 n. 3 (C.A.D.C.).

[2] Both the court of appeals, on April 20, 1967, and this Court, on April 21, 1967, denied petitioners' motion for a stay pending appeal; and petitioners subsequently complied substantially with the subpoenas.

this Act *or other Federal law.*" (Pet. App. 17; emphasis added.) Petitioners contend that because of the operation of these sections, inspection by the Secretary of the unions' records would violate their Fourth Amendment rights.

But the record refutes petitioners' allegation that the Secretary initiated the investigation for the purpose of gathering evidence for the government's criminal prosecution. The uncontradicted Kleiler affidavit, quoted above, shows that the Secretary was acting within his authority under Section 601(a).[3] Since the courts below have found that petitioners failed to establish a factual predicate for their constitutional claim, there is no occasion in this case to consider whether an investigation by the Secretary designed to gather evidence for a criminal prosecution of individuals would have violated any of petitioners' constitutional rights.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1968.

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[3] It has consistently been held that the Secretary does not have to show probable cause in order to obtain access to union records. *International Brotherhood of Teamsters* v. *Wirtz*, *supra*; *International Brotherhood of Teamsters* v. *Goldberg*, 303 F. 2d 402 (C.A.D.C.), certiorari denied, 370 U.S. 938; *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F. 2d 807 (C.A. 6), certiorari denied, 368 U.S. 938.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 240

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO, and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, GREAT LAKES DISTRICT, AFL-CIO,

Petitioners,

against

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor.

REPLY MEMORANDUM FOR PETITIONERS IN SUPPORT

HOWARD SCHULMAN
50 Broadway
New York, New York, 10004

and

STEPHEN KURZMAN
1616 H Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioners

BERTRAM PERKEL
ANDREW T. McEVOY, JR.
of Counsel

IN THE

Supreme Court of the United States

October Term, 1968

No.

SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES AND INLAND WATERS DISTRICT, AFL-CIO, and SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, GREAT LAKES DISTRICT, AFL-CIO,

Petitioners,

against

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor.

REPLY MEMORANDUM FOR PETITIONERS IN SUPPORT

1. The Solicitor General agrees, albeit obliquely, that the issue raised by this petition is appropriate for consideration by this Court.

2. The Solicitor General suggests, however, that the issue should not be considered in this case because ". . . petitioners failed to establish a factual predicate for their constitutional claim . . . ." (Solicitor's Memorandum in Opposition, page 3).

3. The Solicitor General avers that the Kleiler affidavit demonstrates that the Secretary of Labor was acting within his authority in conducting the complained of audit.

4. Petitioners do not question generally the right of the Secretary to conduct audits under his statutory grant of power [Section 601(a) of the Act, 29 U.S.C. Section 521(a)].

5. Petitioners, however, do question the right of the Secretary to conduct an audit under the LMRDA at the behest and instigation of the Department of Justice to gather evidence for the latter's use in a federal grand jury investigation and subsequent criminal prosecution in Chicago, wholly unrelated to the purposes or scope of the LMRDA.

6. On this issue the Kleiler affidavit is silent.[1] It neither affirms nor denies the petitioners' charge for "fronting."

7. The Solicitor General's attempt to raise a factual issue at this stage of the proceedings is disingenuous at best.

At all stages in this proceeding the Secretary has been the only one who has had personal knowledge of the facts. Yet, it is he who has consistently failed (or refused) to deny that he was auditing for the benefit of and at the behest of the Department of Justice. See, e.g., *Brady* v. *Maryland*, 373 U.S. 83 (1963).

8. The record shows that petitioners have presented a proper case for this Court's consideration of the issue,

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[1] It is upon the Kleiler affidavit that the Solicitor places his sole and entire reliance. (Solicitor's Memorandum in Opposition, pp. 2-3).

whether as posed by petitioners or as posed by the Solicitor General in his reply memorandum.

9. The petition accordingly should be granted.

Respectfully submitted,

HOWARD SCHULMAN
50 Broadway
New York, New York, 10004

and

STEPHEN KURZMAN
1616 H Street, N.W.
Washington, D. C. 20006

Attorneys for Petitioners

BERTRAM PERKEL
ANDREW T. MCEVOY, JR.
of Counsel